NO. 2564.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Appellant,

vs.

ST. PAUL, MINNEAPOLIS and MANITOBA RAILWAY COMPANY, a Corporation, and GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Appellees.

BRIEF OF APPELLANT.

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United States Attorney,

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FRANK WOODY,
Assistant U. S. Attorney.

NAEGELE PRINTING CO., HELENA, MONT.

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STATEMENT OF CASE.

This is an appeal from the decree entered by the District Court of the United States for the District of Montana on the 28th day of May, 1914, in favor of appellees and against the appellant and dismissing appellant's amended bill of complaint.

The action in which said decree was entered was brought by appellant for the purpose of having

cancelled and set aside on the grounds of fraud on the part of the patentee and inadvertence on the part of the officers of the land department a patent for lands theretofore issued to the St. Paul, Minneapolis and Manitoba Railway Company, one of the appellees, the amended bill of complaint having been filed on Jan. 19, 1914.

The amended bill of complaint (Tr. pp. 1-14), alleges in substance the following: That the appellees are corporations, (Tr. p. 2); that prior to June 17th, 1907, the plaintiff was the owner in fee of the lands described in the amended bill of complaint (Tr. p. 2); that in September, 1895, said lands were classified as mineral by the board of mineral land commissioners under the Act of February 26, 1895, (28 Stat. 683), (Tr. p. 5); that the Northern Pacific Railroad Company filed a protest against said classification with the Register and Receiver of the United States Land Office at Missoula, Montana, and on a hearing of such protest said Register and Receiver adjudged said land to be non-mineral (Tr. pp. 5-6); that upon appeal to the Commissioner of the General Land Office the decision of the Register and Receiver was affirmed (Tr. p. 6); that on appeal to the Secretary of the Interior such decision was on April 30th, 1900, reversed and said lands were held to be mineral, and that upon a motion to review the Secretary of the Interior adhered to his former decision, and on June 15th, 1901, the Secretary of the Interior approved the classification of said lands made by

said board of mineral land commissioners (Tr. p. 6); that through inadvertence and mistake the Register and Receiver of the United States Land Office at Kalispell, Montana, were not notified of the decision of the Secretary of the Interior holding said lands to be mineral or of the approval of such classification of the board of mineral land commissioners by the Secretary of the Interior until May 8th, 1907 (Tr. pp. 6-7); that on March 31st, 1906, the appellee St. Paul, Minneapolis & Manitoba Railway Company filed in the land office at Kalispell a certain list of lands, describing the lands described in the amended bill of complaint and that attached to said list was an affidavit of the duly authorized agent of said appellee St. Paul, Minneapolis & Manitoba Railway Company, in which it was alleged, claimed and asserted that said lands were selected by said St. Paul, Minneapolis & Manitoba Railway Company and that said lands were a portion of the public lands claimed by it as inuring to it under the Act of August 5, 1892, and that said lands were vacant and unappropriated and were not interdicted nor reserved lands and were of the character contemplated by said Act, (Tr. p. 3); that upon payment of the required fees a receipt and certificate approving said list was obtained from the Register and Receiver of said land office, in which certificate it was certified that said list was found to be accurate by a search of the records, plats and files of said land office and that said lands were not classified and returned as mineral

lands, (Tr. pp. 3-4); that in order to obtain patent to said lands under said Act of Aug. 5, 1892, it was necessary for said St. Paul, Minneapolis & Manitoba Railway Company to file said list and affidavit and secure said receipt and certificate of approval, and it was also incumbent upon it to prove to the satisfaction of said Register and Receiver, and to the officers of the General Land Office, by satisfactory testimony and evidence that said lands were of the character contemplated by said Act (Tr. p. 4); that said lands when so selected were lands belonging to appellant's public domain, and were and are mineral lands of great value, and were not subject to selection by said St. Paul, Minneapolis & Manitoba Railway Company as inuring to it under said Act, all of which said St. Paul, Minneapolis & Manitoba Railway Company, by its officers, attorneys and agents, at the time of the filing of said list and at all times subsequent thereto well knew (Tr. pp. 4-5); that thereafter such proceedings were had that on June 24, 1907, a patent was issued to and received by said St. Paul, Minneapolis & Manitoba Railway Company (Tr. p. 5); that said receipt and certificate were issued by said Register and Receiver in reliance by them upon the truth of said list and affidavit and the statements therein contained, and that said patent was issued by the officers of appellant in reliance by them upon the truth of said list and affidavit and the statements therein contained and said certificate and receipt of the said Register and Receiver, and through inad-

vertence and mistake in overlooking the decision of the Secretary of the Interior holding said lands to be mineral and the approval of the classification thereof by the Secretary of the Interior (Tr. p. 7); that said list and affidavit was false and fraudulent as was then and there known to said St. Paul, Minneapolis & Manitoba Railway Company, by its officers, agents and attorneys, and that said list and affidavit was filed with intent to deceive the officers of the appellant and to fraudulently obtain and procure the issuance of said certificate and receipt and to fraudulently obtain title to said lands by means of the false and fraudulent statements and testimony contained in said list and affidavit, in this, that said lands were not a part of the public lands innuring to said St. Paul, Minneapolis & Manitoba Railway Company under the Act of August 5, 1892, and that said lands were interdicted mineral lands and were not of the character contemplated by said Act, and that each of the statements set forth and contained in said list and affidavit to prove the lands were of the character contemplated by said Act were utterly false and fraudulent and untrue, as was then and there well known to the said St. Paul, Minneapolis & Manitoba Railway Company at the time of the filing of said list and affidavit, and that at such time said St. Paul, Minneapolis & Manitoba Railway Company had full and complete notice and knowledge of the mineral character of said lands (Tr. pp. 8-9); that the officers and agents of the appellants believing that

the statements contained in said list and affidavit were true, and that said lands were of the character contemplated by said Act were wholly deceived and imposed upon and misled into the issuance of said receipt and certificate and believing the statements contained in said list and affidavit to be true and through inadvertence and mistake in overlooking the decision of the Secretary of the Interior holding said lands to be mineral and the approval of such classification by the Secretary of the Interior the officers of the appellant were wholly deceived, imposed upon and misled into permitting the issuance of said patent (Tr. pp. 9-11); that after issuance of said patent the appellant demanded a reconveyance to it of said lands (Tr. p. 11); that the appellee Great Northern Railway Company claims some interest in said lands, the precise nature of said claim being unknown to appellant, but that if the said Great Northern Railway Company has any interest in said lands the same was acquired with notice and knowledge by said Great Northern Railway Company, prior to the acquiring of such interest, of all of the facts set forth in the amended bill of complaint, and that said Great Northern Railway Company never paid any consideration for any such interest, (Tr. pp. 11-12).

To the amended bill of complaint the appellees filed a motion to dismiss (Tr. pp. 14-16), and on March 31st, 1914, the Court filed its decision sustaining said motion to dismiss, (Tr. pp. 16-18), and thereafter and on May 28th, 1914, a decree was duly

made and entered dismissing the appellant's amended bill of complaint, (Tr. pp. 18-20).

ASSIGNMENT OF ERRORS.

With the petition for appeal the following assignment of errors were filed. (Tr. pp. 21-24),

First: That the court erred in finding that the allegations of the amended bill of complaint herein were insufficient to constitute a cause of action in equity.

Second: That the court erred in finding that, after five years, no matter what error or mistake the land department of the United States of America made, no matter how gross the fraud and misrepresentations of the patentee, St. Paul, Minneapolis and Manitoba Railway Company, were, the Act of Congress of the United States, approved March 3rd, 1891, Section 8, made the voidable patent mentioned in the bill of complaint herein valid, provided, the lands were public lands of the United States of America open to conveyance by the land department of the United States of America.

Third: That the court erred in finding that the Act of Congress of the United States, approved March 2nd, 1896, extended the provisions of the Act of Congress of the United States, approved March 3rd, 1891, to patents to railroads for grant lands secured by fraud and misrepresentations as well as to those patents erroneously issued.

Fourth: That the court erred in finding that the Acts of Congress of the United States, approved, both respectively, March 3rd, 1891, and March 2nd, 1896, applied to and embraced patents to lands issued through the patentee's fraud.

Fifth: The court erred in finding that the land patent, sought to be annulled and cancelled by this action, was one issued to the beneficiaries of public grants of land in lieu of granted lands lost to such beneficiaries because of the failure of the United States of America to withdraw such granted lands from entry.

Sixth: The court erred in holding that, if the lands, described in the bill of complaint herein, were public lands of the United States of America, open to patent by the Land Department, that under the provisions of the Acts of Congress of the United States, approved March 3rd, 1891, and March 2nd, 1896, each respectively, once patent inquiry is closed, suit to annul or cancel the patent is prohibited.

Seventh: That the court erred in finding that no matter what fraud induced the issuance of a patent to land in general by the United States of America, no suit could be maintained to cancel such patent after five years from the date of issuance of such patent.

Eighth: That the court erred in finding that no matter what fraud induced the issuance of patent for grant land by the United States of America, no suit could be maintained at any time to cancel or

annul such patent.

Ninth: That the court erred in holding and finding that the cause of action alleged in complainants bill of complaint herein is not maintainable and is forbidden by the provisions of the Act of the 54th Congress of the United States, approved March 2nd, 1896, entitled, "An Act to Provide for the Extension of the Time Within Which Suits May be Brought to Vacate and Annul Land Patents, and for Other Purposes" (29 Statutes at Large, page 42).

Tenth: That the court erred in holding and finding that the lands described in the amended bill of complaint herein, the patent to which plaintiff sought to cancel and annul, were and are lands, and that said suit was brought and that recovery was sought by complainant, for lands, that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the United States of America and its officers to withdraw the same from sale and entry.

Eleventh: The Court erred in refusing to find and hold that the facts alleged in complainant's bill of complaint were sufficient to constitute a cause of action in equity and that such cause of action was not barred or forbidden by the provisions of the Act of Congress of the United States, approved March 2nd, 1896.

Twelfth: That the court erred in holding that the bill of complaint herein states no cause for

equitable relief.

Thirteenth: That the court erred in sustaining defendants' motion to dismiss complainant's bill of complaint herein with prejudice.

Fourteenth: That the court erred in holding that under the pleadings herein complainant was entitled to no relief in equity as prayed for in the bill of complaint.

Fifteenth: That the court erred in entering a decree herein dismissing complainant's bill of complaint.

ARGUMENT.

The motion to dismiss (Tr. pp. 14-16), was made upon two grounds, one general in its nature and the other special. The first, or general, was insufficiency of facts to constitute a cause of action in equity, and the second, or special, was that it appears from the amended bill of complaint that the lands, the patent to which it was sought to annul, were lands patented in lieu of other lands covered by a grant which were relinguished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from sale and entry, and that it therefore appears from said amended bill of complaint that said suit was brought in violation of the provisions of Chapter 39 of the Acts of the Fifty-fourth Congress, approved Mar. 2, 1896, (29 Stats. at L. 42), and that said suit was

brought without authority and it was barred by the provisions of said statute.

In sustaining the motion to dismiss, the court, in its decision construed the following statutes:

Section 8 of the Act of Mar. 3, 1891, (26 Stats. at L. 1098), (6 Fed Stats. Ann. 526), which is as follows:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

Section 1 of the Act of Mar. 2, 1896, (29 Stats. at L. 42), (6 Fed. Stats. Ann. 449), which is as follows:

> "That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title

of such purchaser is hereby confirmed. Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or reliquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

Section 2 of the Act of Aug. 5, 1892, (27 Stats. at L. 390), (6 Fed. Stats. Ann. 447), which reads as follows:

"That the said railway company is hereby permitted to select in lieu of any lands forming odd-numbered sections or parts thereof situated in the State of North Dakota or in the State of South Dakota, within the ten mile limits of a grant of lands made to the Territory of Minnesota * * * opposite to and coterminous with such portion of said railroad as was constructed and completed within the time required by said grant and the acts amendatory thereof for the construction and completion of the whole of said railroad, which, prior to January first, Anno Domini eighteen hundred and ninety one, any person had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, but not including any lands within the limits of the grant to aid in the construction of the Saint Vincent branch of said road, as located under the Act of March third, eighteen hundred and seventy one, upon which

any person or persons had, in good faith, settled or made or acquired valuable improvements thereon prior to March, eighteen hundred and seventy eight, an equal quantity of non-mineral public lands, so classified as non mineral at the time of actual government survey which has been made or shall be made, of the United States, not reserved and to which no adverse right or claim shall have been attached at the time of the making of such selection lying within any state into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and and released * * *."

Assignments of Error Nos. 1, 6, 9, 11 and 12 are intended to attack the decree entered on that portion of the decision sustaining the motion to dismiss on the ground that the bill of complaint does not state facts sufficient to constitute a cause of action in equity; Nos. 5 and 10 to attack the decree entered on that portion of the decision sustaining the motion to dismiss and holding that the action was brought to cancel a patent to lands which had been selected and patended in lieu of lands orginially granted and lost or relinquished by reason of the failure of the Government to withdraw such lands from entry and sale; Nos. 2, 3, 4, 7 and 8 to attack the decree entered on that portion of the decision sustaining the motion to dismiss on the ground that said action was barred by the provisions of Section 1 of the Act of Mar. 2, 1896, while Nos. 13, 14 and 15 are intended to attack the whole decree entered

on the decision dismissing the bill of complaint and ordering the entry of the decree.

Instead of taking up and considering each assignment of error separately we will take them up and consider them in the groups as we have hereinbefore referred to them.

ASSIGNMENTS OF ERROR NOS. 1, 6, 9, 11 and 12.

All of these assignments of error are to the effect that the court erred in holding that the amended bill of complaint did not state facts sufficient to constitute a cause of action in equity.

The action having been commenced within six years after the date of issuance of the patent, and the amended bill of complaint alleging both fraud on the part of the patentee, and inadvertence and mistake on the part of the officers of the Government, unquestionably if the last proviso of Section 1 of the Act of Mar. 2, 1896, does not apply to suits instituted to cancel patents issued after the passage of that act then the complaint does state facts sufficient to constitute a cause of action in equity.

We contend that the last proviso of Section 1 of the Act of Mar. 2, 1896, does not apply to suits instituted or brought to cancel patents to lands which were issued after the passage of the Act.

By reference to Section 8 of the Act of Mar. 3, 1891, it is found that it contains two provisions; the first relates to suits to cancel patents issued before the passage of the act which must be instituted

within five years after its passage, while the second relates to suits instituted to cancel patents issued after the passage of the act which must be instituted within six years after the date of issuance of patent.

By reference to Section 1 of the Act of Mar. 2, 1896, it is found that it contains four provisions; the first relates to suits instituted to cancel patents issued before the passage of the act which must be instituted within five years after its passage; the second relates to suits instituted to cancel patents issued after the passage of the act which must be instituted within six years after its passage; the third relates to suits to cancel patents when the lands have passed to bona fide purchasers; and the fourth relates to suits to cancel patents to lands that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw from entry and sale the lands originally granted and lost or relinquished.

It will be seen that in Section 8 of the Act of Mar. 3, 1891, and in the first two provisions of Section 1 of the Act of Mar. 2, 1896, Congress was very careful to refer specifically to suits instituted to cancel patents issued both before and after the passage of the acts so that there could be no question as to what particular suits those provisions applied, but that in the fourth provision of Section 1 of the Act of Mar. 2, 1896, no reference whatever is made to the institution of suits to cancel patents is-

sued after the passage of the act, the words used being "that were certified or patented in lieu of other lands." If it was the intention of Congress that this last provision of Section 1 of the Act of Mar. 2, 1896, was to apply to suits to cancel patents issued after the passage of the act as well as before the passage of the act, why, instead of the words "that were" being used, were not the words "that were or may be hereafter" used, or why did not Congress, in this last proviso state in specific words, or terms, as it did in the first two provisions, that it was to apply not only to actions to cancel patents issued before the passage of the act but also to actions to cancel patents issued after the passage of the act?

In order to determine the intention of Congress with reference to the proviso of Section 1 of the Act of Mar. 2, 1896, with which we are here concerned we may examine not only the whole of said section and the whole of said act but also Section 8 of the Act of Mar. 3, 1891, and we may also consider the history of the legislation and the circumstances under which the law was enacted. In other words the proviso is to be read and considered in connection with the other provisions of the act of which it is a part, with previous acts covering the same subject and in the light of matters of public history relating to railroad grants made by the United States.

Jennison v. Kirk, 98 U. S. 453, 457.

During a period covering many years prior to the passage of the Act of Mar. 2, 1896, Congress had made many extensive grants of public lands to aid in the construction of railroads and wagon roads, nearly, of not all of these granted lands lying in the Western and Pacific Coast states. The acts making these grants usually provided that the grant was to attach to certain lands lying within certain limits on each side of the railroad or wagon road to be constructed, as the same were finally located and constructed. At the time of the passage of these granting acts and at the time the roads were finally located and constructed and during a period of many years after their construction, practically none of these lands were surveyed, and the Government was unable, until such lands were actually surveyed, to definitely determine what particular lands passed by these grants, and the roads having been constructed before the lands were surveyed it frequently happened that, through lack of information in the general land office regarding the definite line of location and construction of the roads, lands to which it was afterwards found the grant attached were not withdrawn from entry and sale, but had been settled upon and valuable improvements had been made thereon in good faith. In order to protect these settlers we find Congress, from time to time, enacting legislation for the relief of settlers and also for the relief of the grantees, this legislation usually requiring the grantees to relinquish these lands and permitting them to select in lieu

thereof the same quantity of agricultural land within certain limits.

By the Act of Mar. 3, 1887, (24 Stats. at L. 256), (6 Fed. Stats. Ann. 433), the Interior Department was directed to adjust all of the various railroad and other land grants as speedily as practicable, and whenever it was found that lands had been erroneously patented, the law provided that action should be brought to cancel such patents.

By Section 8 of the Act of Mar. 3, 1891, it was provided that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years from the passage of the acts and suits to vacate and annul patents thereafter issued should only be brought within six years after the date of the issuance of such patents.

It seems that by 1896 the Interior Department had not completed the adjustment of all of the railroads grants and consequently the limitations contained in the Act of Mar. 3, 1891, were about to expire when the President, on January 17, 1896, addressed a message to Congress recommending that the Act of 1891 be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants.

Report No. 253 House of Representatives,
54th Congress, 1st Sess.

In accordance with the President's message a bill was reported by the Committee on Public Lands

of the House, the first section of which was as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a special grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. But no patents to any lands held by a bona fide purchaser shall be annulled or vacated, but the right and title of such purchaser is hereby confirmed."

When this bill was under consideration in the House it was represented by Mr. Hepburn, of Iowa, that there were certain cases where the purchasers from railroad companies were entitled to protection and he cited a case where the Interior Department held that lieu lands might be given because through an oversight on the part of the officers of the United States the lands lying on the line of road within the limits of the grant were not withdrawn from entry and sale for a considerable period during which time settlers settled upon and made valuable improvements on such lands. In that case, when the road was constructed, it was found that, excluding these lands, there was not sufficient lands within the limits of the grant to meet the purposes of the grant and, as stated, the Interior Department held that lieu lands might be given in another locality.

It was represented that the railroad company was compelled to go far beyond the limits of its grant and select lands which were not benefitted by the construction of the railroad, and that over 200,000 were so selected. It was also represented that the law officers of the Interior Department subsequently changed their views and that the railroad company had no right to take these lands beyond the limits of their grants in lieu of the land within the limits of their grant lost to them by such entry and sale to settlers.

Upon hearing this objection and these representations Mr. Lacey, the Chairman of the House Committee on Public Lands, who had reported the bill and who was in charge of it, submitted the amendment which constitutes the proviso under consideration.

> Congressional Record, 54th Congress, 1st Session.

Thus it appears that the lands taken by the company in the case cited and to which the proviso in question was intended to apply, were lands to which the company had no right under the grant, or by virtue of any law to select, but which had been selected by it and passed to patent, and that the Interior Department had changed its former holding and intended to recover the lands if possible.

We therefore submit that from the language used in Section 1 of the Act of Mar. 2, 1896, and from the conditions which existed at the time of the

passage of the act, which conditions were known to and fully considered by Congress at that time, and from the circumstances surrounding its passage, it is clearly and plainly evident that it was the intention of Congress that the last proviso of section 1 of said act was only to apply to patents theretofore issued for lands certified or patented in lieu of other lands originally granted and which were lost or relinquished by the failure of the Government of its officers to withdraw such lands from entry and sale, and that Congress did not intend such proviso to apply to patents for such lands issued after the passage of such act, and that the court therefore erred in holding that such proviso applied to patents issued for such lands after the passage of the act and in holding that therefore the amended bill of complaint failed to state facts sufficient to constitute a cause of action in equity.

ASSIGNMENTS OF ERRORS NOS. 5 AND 10.

The court, in its decision sustaining the motion to dismiss, found that, "It appears from said amended Bill of Complaint that the lands described in said amended Bill of Complaint, the patent to which the complainant seeks to annul, were and are lands that were patented in lieu of other lands covered by a grant, which were relinquished by the grantee in consequence of the failure of the Government and its officers to withdraw the same from entry and sale;" (Tr. p. 15). In so finding we believe that the court committed error.

By an examination of the amended bill of Complaint (Tr. pp. 1-14), we find that it is alleged that on March 31st, 1906, the appellee, St. Paul, Minn. & Manitoba Ry. Co., filed a certain list of lands and that attached to said list was an affidavit in which it was alleged, claimed and asserted that said lands were selected by it and inured to it under the Act of August 5, 1892, and that said lands were vacant and unappropriated and were not interdicted nor reserved and were of the character contemplated by said act (Tr. p. 3), and that it was the duty of the appellee filing such list to prove to the satisfaction of the officers of the Government that said lands were of the character contemplated by the act, (Tr. p. 4). We also find that it is alleged in the amended bill of complaint that said lands when so selected were not subject to selection by said appellee as inuring to it under said act (Tr. p. 5), and that said lands were not a part or portion of the public land inuring to it under said act and that the same were not of the character contemplated by the act (Tr. p. 8). The substance of these allegations is that the appellee claimed the lands as inuring to it under the Act of August 5, 1892, but that these claims of the appellee were false, fraudulent and untrue, Nowhere in the amended bill of complaint is there any admission of any kind to the effect that the patent which the suit seeks to annul was issued for lands in lieu of other lands lost or relinquished by reason of the failure of the Government to withdraw the same from entry and sale.

ASSIGNMENTS OF ERROR NOS. 2, 3, 4, 7 AND 8.

All of these assignments of error relate and refer to the holding of the court, in sustaining the motion to dismiss, that under the last proviso of Section 1 of the Act of Mar. 2, 1896, a suit to cancel or annul a patent issued to a railroad company for lands selected in lieu of lands granted and lost or relinquished by reason of the failure of the Government or its officers to withdraw such lands from entry and sale cannot be maintained even tho' the patentee secured the issuance of such patent by means of fraud, and that such an action is barred thereby.

Even tho' it may be held that the last proviso of Section 1 of the Act of Mar. 2, 1896, applies to patents issued after the passage of the act as well as to patents issued before the passage of the act, we do not believe that it was the intention of Congress to say that once patent inquiry be closed the patent cannot thereafter be attacked no matter how gross the fraud and misrepresentations of the patentee.

There is nothing whatever in the act to indicate that Congress had in view a selection authorized by an act of Congress, and which, if otherwise regular, needed no statute of limitations for its protection. The selections under consideration, if made under any authority, were made under the authority contained in the Act of August 5, 1892, supra.

It has been shown hereinbefore, what lands

were intended to be protected by this proviso, namely, lands which railroad companies had been authorized by the Interior Department to select because the officers of the Department had erroneously allowed settlers to acquire title to lands which properly belonged to the companies. The case at bar is entirely different. The Government did not bring this action to cancel the patent because the company was misled by the action of the land department but, on the contrary, for the reason that the company deceived the land department and by fraud and deceit procured under an agricultural land grant lands which were known to be mineral, and which under the grant and the act permitting lieu land selections, were expressly exempted from the grant and from lieu selection. The allegations of the amended bill of complaint, in express terms, alleges fraud and deceit on the part of the patentee (Tr. pp. 5, 8, 9, 10, 11).

Congress has unequivocally declared that mineral lands may be acquired only under the mineral land laws and are not to be included in any other grant. Not only has Congress excepted mineral lands from all railroad grants, but during the year following the passage of the Act of July 5, 1864, granting lands to the Northern Pacific Railroad Company, Congress, by a joint resolution declared:

> "That no act passed at the first session of the 28th Congress granting lands to states or corporations to aid in the construction of roads or other purposes, or to extend the time of

> grants heretofore made shall be so construed as to embrace mineral lands which in all cases shall be and are reserved expressly to the United States unless otherwise specially provided in the act or acts making the grant."

13 Stats. at L. 567.

See also Barden vs. N. P. Ry. Co., 154 U. S. 288.

It will also be observed that by the Act of Aug. 5, 1892, it is expressly provided that lands selected under the provisions of said act should be:

> "Non-mineral public lands, so classified as non-mineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection."

That Congress by the proviso of Section 1 of the Act of Mar. 2, 1896, with which we are here concerned, did not intend to protect a fraudulent selection of mineral lands, after the same had been passed to patent, seems to us too clear for controversy. It is true the statutes of limitation are remedial and for that reason are entitled to favorable consideration, but it must also be remembered that a statute of limitation against the sovereign is an innovation wholly inconsistent with the theory of government, and unless it clearly appears that a

case falls within the statute no presumption can be indulged to include it.

It appears from the allegations of the complaint, which must be taken as confessed by the motion to dismiss, that the lands, to which the patent involved in the suit was issued, were mineral lands, that they had, long prior to the filing of the lieu land selection list, been determined by the land department to be mineral lands, and that these facts were known to the patentee at the time such lieu land list was filed and at the time such patent was issued to the patentee.

Under the Act of August 5, 1892, these lands could not have been lawfully patented to the patentee, and at the time of their selection and at the time of the issuance of patent there was on the statute books no law which would permit mineral lands to be lawfully patented to the patentee, under any conditions whatever.

There can be no doubt that the proviso in question, if taken literally and strictly, would forever bar any action to set aside or cancel a patent for such lieu lands no matter how entirely unlawful, *ultra vires,* may have been its issue, or how fraudulently obtained. But we do not believe such was the intention of Congress. We do not believe that Congress ever intended to throw its shield of protection over any such patent issued by the officers of the Government, without authority of law or when procured by the fraud and deceit of the patentee. Suppose, for instance, by mistake, or from

any other cause or motive, the government officials should include in such a patent for lieu lands, land already appropriated and occupied for military purposes, or for any other public purpose, and which could not lawfully be sold or conveyed at all, did Congress, by the said proviso intend to bar or ~~cor~~-prohibit ~~rect~~ any action to correct the wrong?

It seems to us that by this proviso Congress intended merely to protect patents for such lieu lands from attack for any mistake or irregularity of officers, *acting within the scope of their authority.*

By the Act of August 5, 1892, Congress expressly authorized the grantee to select lands in lieu of those relinquished by it;

> "* * * an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs * * *."

This is the only authority for the selection or patenting of any lands in lieu of those relinquished, and this expressly exempts mineral lands.

Did not Congress, by this proviso, intend to protect patents for lands thus selected, that is "non-mineral public lands" without intending to go further and to protect every patent for lieu lands

however unlawful may have been its issue or however fraudulent its procurement?

From an early day it has been the uniform policy of Congress and of the Government to classify and dispose of the public domain according to its nature; as agricultural, mining or stone and timber lands; and to provide different modes and kinds of payment for the acquisition of these different classses of lands. And, except in cases of purchase, or commutation for cash, no land of one class can be acquired or patented under the modes or for the consideration provided for either of the other classes of land.

This has been the long, uniform and continuous policy and practice of Congress and of the Government, and with reference to which all laws providing for the disposal of public lands must be construed, so as to make them all a harmonious whole.

In harmony with this, all of the many laws granting lands to aid in railroad construction, expressly limit the grant to agricultural or non-mineral lands. And what seems to us conclusive of the question is the fact that the very act under which it is alleged this selection was made and patent issued, itself expressly limits the authority to make such selection or to issue such patent to lands that are non-mineral.

In view of what we have already stated is it not fair to presume that when Congress came to add this proviso to Section 1 of the Act of Mar. 2, 1896, it intended to protect patents which were, by law

authorized to be issued, and that it did not intend thereby to in any manner prevent the bringing or maintaining of actions to cancel patents issued for such lieu lands when such patents had been unlawfully issued or had been procured by the fraud and deceit of the patentee. That we cannot impute to Congress the latter intention would seem apparent from Section 2318, Revised Statutes, which provides:

> "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

And the Supreme Court has said in the case of Deffeback vs. Hawkes, 115 U. S. 392-404:

> "It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of the sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the preemption or homestead laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas."

To say that this proviso applies to the case at bar, is to say that, notwithstanding all this and the uniform policy and practice of Congress and the Government, lands which are known to be mineral and which have been classified by the land Department as mineral, may be by fraud and deceit

selected and patented as lieu lands. It does not seem to us that such is the proper construction of this proviso.

One of the fundamental legal presumptions is that which presumes that a legislature never intends to stultify its acts by enacting inconsistant or conflicting laws, but that all its laws in *pari materia* are intended to be consistent with each other and to form a harmonious whole. And all laws must, when possible, be so construed as to not violate that intention. And in view of the long continued and uniform policy of Congress, expressed in numerous statutes, and of the decisions of the land Department and as recognized and asserted in many decisions of the Supreme Court, that public lands shall not and cannot be disposed of except in the manner and upon the terms expressly provided by statute for their disposal it seems to us, by every principle of legal construction that this proviso should be so construed that it will be harmonious and consistent with this long and uniform policy and with all of the other statutes with reference to the disposal of mineral lands.

We are bound to assume that Congress, in enacting this proviso, had in mind its various enactments upon this subject, and the uniform policy of the Government and the decisions of the Supreme Court with reference to mineral lands; and we are equally bound to presume that it did not, by this proviso, intend to depart from all this. And it seems entirely fair to presume that Congress had

in mind and intended thus to protect only such patents for such lieu lands as might be lawfully given away as such without intending to make valid every patent to lieu lands issued contrary to express law or procured by fraud and deceit.

In construing statutes courts often depart from the literal language and change its grammatical construction, or add or reject words, when found necessary to give such statutes the meaning intended by the legislatures enacting them.

The case of Northern Pacific Ry. Co. vs. United States, 176 Fed. 706, was one brought by the United States to cancel a patent for lieu lands issued to the railroad company, upon the ground that the lands in question were mineral and, therefore, could not be legally granted as such lands. In the lower court a decree was rendered in favor of the United States and upon appeal by the railroad company the Circuit Court of Appeals affirmed the decree.

That case differs from the case at bar in this; that while the railroad company had relinquished the original lands it was because they were found to be within the limits of a national reserve, and not "in consequence of the failure of the United States or its officers to withdraw them from entry or sale." Otherwise that case is on all fours with the case at bar, and like the case of Deffeback vs. Hawkes, supra, is emphatic in the statement that mineral lands cannot be lawfully granted to a railroad company as lieu lands, and that such a patent will be set aside for that reason alone.

If in a case where a railroad company has relinquished to the United States a portion of its granted lands because they are found to be within a national reserve and has received patent for mineral lands in lieu thereof, such patent may be set aside because mineral lands cannot thus be disposed of, it is difficult to see on principle why a different rule should prevail where the original granted lands have been relinquished because of valid claims of settlers attaching thereto and patents have issued to mineral lands in lieu thereof. Especially is this true where, as in the case at bar, the lieu lands were not only mineral lands, but were known to the grantee to have been classified as and held by the Department to be mineral lands at the time of the filing of the lieu selection list.

When congress had in so many acts, and so uniformly, declared that mineral lands should only be disposed of in the mode and upon the terms provided by law for their disposal, and in every act granting lands to railroads and in every act granting lieu lands to railroads, had expressly and carefully provided that no mineral lands should be thus granted, selected or patented, it had a right to assume that its mandate would be obeyed and that no patent for lieu lands would be issued covering mineral lands. And, when, by this proviso, it undertook to protect patents for lieu lands, it is entirely fair to presume that it had in mind and intended to protect only those patents which it had authorized by statute. And it seems to us that it would be out

of all reason to suppose that it is intended to protect, validate and confirm patents issued in violation of its laws or procured by fraud and deceit.

In the case of Diamond Coal and Coke Co. v. United States, 233 U. S. 236, 238-239, Mr. Justice Van Devanter, in delivering the opinion, said:

> "As the arguments of counsel have taken a wide range and in some respects have departed from the settled rules of decision applicable in cases like this, it will be appropriate to restate those rules before turning to the evidence. They are:"
>
> "1. Questions of fact arising in the administration of the public land laws, such as whether lands sought to be entered are mineral or non-mineral, are committed to the land officers for determination; and as their decision must rest largely or entirely upon proofs outside the official records, it is possible in ex parte proceedings, as was the case here, for applicants, by submitting false proofs, to impose upon those officers and secure entries and patents under one law, when if truthful proofs were submitted the lands could not be acquired under that law but only under another imposing different restrictions upon their disposal. A patent secured by such fraudulent practices, although not void or open to collateral attack, is nevertheless voidable and may be annulled in a suit by the Government against the patentee or a purchaser with notice of the fraud."

And in the case of Burke vs. Southern Pac. Ry.

Co., 234 U. S. 669, 692, Mr. Justice Van Devanter, in the course of the opinion, said:

> "Of course if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral land law, or if they issue such a patent fraudulently, or through mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title, or a mineral claimant who had acquired such rights to the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, and not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent issued and were not prejudiced by it."

It may be asserted that the court in rendering its decision in the case of Burke vs. Southern Pac. Ry. Co., supra, did not have in mind Section 1 of the Act of March 2, 1896, but on page 693 we find the following:

> "The patent here in question was issued July 10, 1894. Apparently the Government never brought a bill to have it vacated or annulled, and the time for doing so apparently expired in 1900, or 1901. Acts March 3, 1891, 26 Stats. 1093, c. 559; March 2, 1896, 29 Stats. 42, c. 39, Section 1."

If the land, covered by the patent in question, at the time the lieu land selection list was filed in the

local land office and at the time patent issued therefor, had been held under valid and subsisting mining locations which locations complied in all respects with the mining laws of the state of Montana and the statutes of the United States, there could be no question but what the owners of such mining locations could have maintained a bill in equity to have the patentee declared a trustee for them, and yet, according to the construction placed on this proviso by the court below, the Government is barred from maintaining an action to regain the title to the land fraudulently acquired by the patentee. In other words under the same conditions the subject may maintain an action which the Sovereign may not maintain.

We respectfully submit that the proviso of Section 1 of the Act of March 2, 1896, was not intended to apply to patents fraudulently procured or unlawfully issued by inadvertence or mistake, and that the court erred in holding that the action at bar was barred and prohibited by virtue of such proviso.

SPECIFICATIONS OF ERROR NOS. 13, 14 AND 15.

If the proviso of Section 1 of the Act of March 2, 1896, with reference to patents issued for lieu lands does not apply to patents issued for such lands after the passage of said act, or even if such proviso does apply to such patents issued after the passage of said act but does not apply to patents

procured by fraud or unlawfully issued through inadvertence or mistake, then the court erred in sustaining the motion to dismiss the amended bill of complaint, and in holding that under said bill of complaint the complainant was not entitled to the relief in equity therein prayed for, and in entering the decree dismissing the amended bill of Complaint.

Respectfully submitted,

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